Supreme Court, U.S.
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In the Supreme Court of the United States

MIKE M. MADANI, et al.,

Petitioners,

v.

SHELL OIL COMPANY and
CHEVRON CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "class action tolling" rule of *American Pipe & Construction v. Utah*, 414 U.S. 538 (1974), allows plaintiffs in a class action that has been dismissed with no determination on class certification to bring a successor class action that would otherwise be time-barred, when the successor class action asserts a Sherman Act rule of reason claim based on the "same evidence, memories, and witnesses" as the antitrust claims asserted in the original class action.

PARTIES TO THE PROCEEDING BELOW

The petitioners, plaintiffs-appellants below, are Mike M. Madani; Rick-Mik, Inc.; Oyster Petroleum, Inc.; M.R. Oyster, Inc.; Habib Enterprises, Inc.; Habib Petroleum, Inc.; Calloway Oil, Inc.; Steven Grossi; Stephen and Annie Schlabs; Sooy, Inc.; Gregoire Dukmajian; William Reed; Samir Bahouth; Arthur Saldana; Amrita Dhillon; Amouna, Inc.; Keith Fullington; Ashkan Corporation; George Rabadi; and Paul Enstad (collectively "Madani")

The respondents, defendants-appellees below, are Shell Oil Company and Chevron Corporation. Saudi Refining, Inc. was a defendant-appellee below but petitioners do not challenge the Ninth Circuit's affirmance of the district court's dismissal of Saudi Refining, Inc. from this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners state that no petitioner is affiliated with any publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (App. 14a-15a) is available at 2009 U.S. App. LEXIS 27042. The opinion of the district court (App. 2a-13a) is not reported.

JURISDICTION

The judgment of the Ninth Circuit was entered on December 11, 2009. A petition for rehearing en banc was denied on January 25, 2010. *See* App. 16a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sherman Act, 15 U.S.C. § 1, and Clayton Act, 15 U.S.C. § 18.

STATEMENT

This case presents an important and unsettled issue of federal civil procedure that has arisen as a result of this Court's decision in *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006) (*"Dagher"* or "the *Dagher* action"), in which this Court held that joint ventures formed by Shell Oil Company ("Shell") and Texaco, Inc. ("Texaco")[1] did not violate Section 1 of the Sherman Act, 15 U.S.C. § 1, under the *per se* rule or the quick look rule of reason, when they set the same prices for the Shell and Texaco brands of gasoline. As

[1] Texaco is now owned by respondent Chevron Corporation ("Chevron").

this Court may recall, the *Dagher* action was brought as a class action on behalf of independent Shell and Texaco dealers. The district court, however, refused to entertain a motion for class certification prior to the action's conclusion. Hence, there was never a determination that *Dagher* could not be maintained as a class action.

Following the entry of final judgment in *Dagher*, the same counsel filed this case, a second class action on behalf of the same class, in which the class claimed that the same conduct of Shell and Texaco challenged in *Dagher* violated Section 1 of the Sherman Act under the full rule of reason and violated Section 7 of the Clayton Act, 15 U.S.C. § 18. The United States District Court for the Central District of California, which had also dismissed the *Dagher* case, dismissed this case on the ground that the statute of limitations had run against the class and that petitioners' claims on behalf of themselves and the putative class are therefore time-barred. The district court held that petitioners did not benefit from *American Pipe* tolling. The Court of Appeals for the Ninth Circuit affirmed.

This petition presents the important question of whether *American Pipe* tolling allows putative plaintiffs in a class action that has been dismissed with no determination on class certification to institute a subsequent class action that would otherwise be time-barred, when the subsequent class action asserts a Sherman Act rule of reason claim based on the "same evidence, memories, and witnesses" as the antitrust claims asserted in the original class action.

The question presented by this petition is an important and unsettled issue of federal procedural law that has led to widespread confusion and conflict in the federal courts.

A. The *American Pipe* Class Action Tolling Rule

In *American Pipe & Construction v. Utah*, 414 U.S. 538 (1974), this Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554.

In *American Pipe*, the State of Utah timely filed a class action on behalf of itself and other similarly situated governmental entities, alleging that the defendants conspired to rig prices in the sale of concrete and steel pipe in violation of Section 1 of the Sherman Act. *Id.* at 540. The district court granted defendants' motion seeking a determination that the action could not be maintained on a class basis, finding that the numerosity requirement of Fed. R. Civ. P. 23 could not be met. *Id.* at 544. Eight days later, after the applicable statute of limitations had expired on the plaintiffs' claim, a group of sixty governmental entities – putative class members – moved to intervene in the action. *Id.* The district court denied the motion to intervene, concluding that the claims of the interveners were time-barred and that the statute of limitations had not been tolled by the filing of the original class action on their behalf. *Id.*

In reversing the district court, this Court held that the commencement of a class action tolls the statute of limitations for all members of the putative class and that such a rule satisfied two important policies. *Id.* 550-553. First, it satisfied the policies behind Federal Rule of Civil Procedure 23. As this Court noted, class actions are "designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* at 550. If the claims of putative plaintiffs were not tolled by the filing of the original class action, those putative plaintiffs would have the incentive to file individual claims to protect their causes of action, "precisely the multiplicity of activity which Rule 23 was designed to avoid." *Id.* at 551. The *American Pipe* tolling rule encourages putative plaintiffs to rely, as they are entitled to do, on the class action already commenced on their behalf. This Court observed that "not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case." *Id.* at 552.

Second, this Court held that the tolling rule is consistent with the twin functions of statutes of limitations: providing defendants with timely notice and avoiding stale claims, since the commencement of a class suit "thereby notifies the defendants not only of the substitution claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *Id.* At 555.

Nine years later, this Court expanded the *American Pipe* tolling rule in *Crown, Cork & Seal Co, Inc. v. Parker*, 462 U.S. 345 (1983). In *Crown, Cork*, this Court held that once the statute of limitations has been tolled by the commencement of a class action on their behalf, it remains tolled for all members of the putative class "until class certification is denied." *Id.* at 354. Further, this Court made clear that *American Pipe* should not be read too narrowly. It held that while *American Pipe* concerned only interveners, the "filing of a class action tolls the statute of limitations 'as to all asserted members of the class' not just intervenors." *Id.* at 350 (quoting *American Pipe*, 414 U.S. at 554). In his concurrence, Justice Powell noted that in order to prevent unfair surprise to defendants, the district court should ensure that the subsequent suit raises the same claims that "concern the same evidence, memories, and witnesses as the subject matter of the original class suit[.]" *Id.* at 355 (quoting *American Pipe*, 414 U.S. at 566) (Blackmun J. concurring).

Under *American Pipe* and *Crown, Cork*, the filing of a class action tolls the applicable statute of limitations for all putative class members during the pendency of the class action until class certification is denied.

While *American Pipe* allowed tolling for putative class members seeking to intervene in a class action following denial of class certification, and *Crown, Cork* extended the application of the tolling rule to putative class members who file subsequent individual suits, neither *American Pipe* nor *Crown, Cork* addressed the issue presented here: whether the *American Pipe* tolling rule applies to putative

class members attempting to pursue a subsequent class action asserting claims involving the same evidence, memories, and witnesses as the original class action, where there was never a determination, let alone denial, of class certification in the original class action.

B. Factual Background

Petitioners operate Shell and Texaco gasoline stations located in California and elsewhere, and allege that respondents violated Section 1 of the Sherman Act by conspiring to fix the prices of Shell and Texaco brands of gasoline sold to independent gasoline station operators.

On January 1, 1998, Shell and Texaco combined their marketing and refining assets in the Western United States and formed Equilon Enterprises LLC ("Equilon"). Later that same year, Texaco, Shell, and Saudi Refining, Inc. ("Saudi Refining"),[2] combined their marketing and refining assets in the Eastern United States and formed Motiva Enterprises, LLC ("Motiva"). The oil companies collectively referred to their combination as "The Alliance" and regarded their unprecedented enterprises as "almost breathtaking in its simplicity and audacity: the whole U.S. Downstream."

In September 1998, Equilon and Motiva moved away from their practice of setting separate and distinct dealer tankwagon prices for the Shell and

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[2] Saudi Refining, Inc. was a defendant-appellee below but petitioners do not challenge the Ninth Circuit's affirmance of the district court's dismissal of Saudi Refining, Inc. from this case.

Texaco brands of gasoline through each company's respective pricing departments. Up until this date, the two brands were priced separately, as they were before the Equilon and Motiva enterprises were formed. In September 1998, however, Shell and Texaco directed Equilon and Motiva to agree together and charge the same dealer tankwagon prices for the Shell and Texaco brands of gasoline. The purpose and effect of The Alliance were to fix the prices of Shell and Texaco branded gasoline throughout the United States.

The implementation of The Alliance's new pricing policy of charging the same price for the Shell and Texaco brands immediately caused dealer tankwagon prices to rise precipitously, even as the price of crude oil fell to historic lows. Respondents' price increases affected not only the purchasers of defendants' gasoline, including petitioners, but virtually the entire market. Respondents' major competitors availed themselves of the price umbrella created by respondents' price increases and raised their prices. As a result, all buyers ended up paying higher prices for gasoline in those markets where defendants raised prices. The Alliance lasted three years, ending in 2001 with Chevron's acquisition of Texaco.

C. The *Dagher* Action

On or about June 15, 1999, Fouad N. Dagher *et al.* filed suit against respondents and others in the United States District Court for the Central District of California. That same day, the plaintiffs in the *Dagher* action filed a first amended class action complaint "on behalf of themselves and the

approximately 23,000 Shell and Texaco branded dealers nationwide who operate or have operated Shell and Texaco branded marketing premises and franchises throughout the United States and who have purchased gasoline from Defendants MOTIVA ENTERPRISES, LLC and/or EQUILON ENTERPRISES LLC, or both, since January 1998 to the present time."[3]

The claims asserted in the *Dagher* plaintiffs' first amended complaint were that by forming Equilon and Motiva and causing both enterprises to charge the same prices for the Shell and Texaco brands of gasoline, defendants had engaged in price fixing in violation of Section 1 of the Sherman Act.

On October 24, 2000, petitioners Mike M. Madani and Paul E. Peterson (both named plaintiffs in *Dagher*), voluntarily withdrew their claims against respondents. The district court dismissed the claims of these petitioners without prejudice on December 4, 2000, and petitioners Madani and Peterson were no longer plaintiffs in the *Dagher* action from and after that date.

During the pendency of the *Dagher* action, the plaintiffs asked the district court for leave to file a motion for class certification. The court declined, however, to entertain any class motion until after the court ruled on defendants' motion for summary judgment. Also, during the course of *Dagher*, plaintiffs' counsel told the district court that the

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[3] Equilon and Motiva were originally named as defendants in the *Dagher* action, but were subsequently dismissed from the case.

plaintiffs were proceeding under a theory that the defendants' agreement on pricing was a violation of Section 1 of the Sherman Act under either the *per se* rule or the quick look rule of reason, and that plaintiffs were not proceeding under the full rule of reason.

The district court granted summary judgment for the *Dagher* defendants, including respondents here, in 2002 and dismissed the case, holding that pricing decisions of the joint ventures did not constitute a *per se* unlawful violation under §1 of the Sherman Act. *Dagher v. Saudi Refining, Inc.*, No. 99-6114, 2002 U.S. Dist. LEXIS 27935 (C.D. Cal. May 21, 2002).

The Ninth Circuit reversed the district court. *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108 (9th Cir. 2004).[4] The *Dagher* defendants then filed a timely petition for a writ of certiorari. This Court granted certiorari, and, holding that defendants' pricing agreement did not violate Section 1 under the *per se* rule or the quick look rule of reason, reversed the Ninth Circuit. *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006). This Court remanded the case to the Ninth Circuit, which then affirmed the district court and issued its mandate to the district court. *See Dagher v. Saudi Refining, Inc.*, 466 F.3d 1120 (9th Cir. 2006). The district court entered its final judgment on November 15, 2006. *See* App. 1a.

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[4] The Ninth Circuit, however, affirmed the district court's summary judgment in favor of defendant Saudi. This aspect of the Ninth Circuit's decision was not reviewed by this Court.

The *Dagher* action terminated on or about November 15, 2006, when the district court received the mandate of the Ninth Circuit Court of Appeals affirming the district court's grant of summary judgment for the respondents pursuant to this Court's decision on February 28, 2006. During the eight years *Dagher* was pending, the district court never permitted a motion for class certification and thus never issued a ruling on class certification.

D. Proceedings Below

On August 21, 2007, petitioners filed this action ("the *Madani* action") on behalf of themselves and a class of persons similarly situated, approximately 25,000 Shell and Texaco branded dealers nationwide who operated or have operated Shell or Texaco branded marketing premises and franchises throughout the United States and who purchased gasoline from Equilon or Motiva, or both, from January 1998 to October 2001. As in *Dagher*, petitioners alleged that respondents' conduct in fixing prices for Texaco and Shell brands of gasoline violated Section 1 of the Sherman Act, but, unlike *Dagher*, petitioners here claim that the pricing agreement violated Section 1 under the full rule of reason, rather than the *per se* rule or the quick look rule of reason. This action expressly excludes from the putative class the named plaintiffs in the *Dagher* action.

This action was originally filed in the United States District Court for the Northern District of California, but was ordered transferred to the Central District of California on January 30, 2008, where it was assigned to the same judge who had

decided *Dagher*. Respondents then moved to dismiss the complaint, pursuant to Rule 12(b)(6), on the ground that petitioners' claims were barred by the applicable statute of limitations, 15 U.S.C. §15b.

On July 11, 2008, the district court granted a defense motion to dismiss based on the statute of limitations, 15 U.S.C. §15b. *See* App. 2a-13a. The district court ruled that this action was untimely because it had not been filed within four years after the dissolution of The Alliance in 2001 and that the *Dagher* action did not toll the statute of limitations for petitioners (putative class members in the *Dagher* action) during the pendency of the *Dagher* action. According to the district court, once the *Dagher* plaintiffs opted not to proceed under the full rule of reason, the statute of limitations commenced running against all putative members of the class on the rule of reason claim and Section 7 of the Clayton Act claim, notwithstanding the court's refusal and failure to rule on a motion for class certification and the absence of notice to the class concerning the choice not to pursue these claims.

Petitioners appealed the district court's order to the Ninth Circuit Court of Appeals, which on December 11, 2009, affirmed the district court's decision. *See* App. 14a-15a. On January 25, 2010, the Ninth Circuit denied Petitioners' petition for rehearing en banc. *See* App. 16a. On February 1, 2010, the Ninth Circuit denied Petitioners' motion to stay the mandate, and the Ninth Circuit issued its mandate on February 5, 2010. *See* App. 17a-18a.

REASONS FOR GRANTING THE PETITION

The issue presented is important and certiorari should be granted to resolve the widespread confusion and conflict among the lower courts over the application of the *American Pipe* tolling rule to a successor class action and to address the Ninth Circuit's erroneous ruling.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE WIDESPREAD CONFUSION AND CONFLICT AMONG THE LOWER COURTS OVER THE APPLICATION OF THE *AMERICAN PIPE* TOLLING RULE TO A SUCCESSOR CLASS ACTION

There is a split in the federal Courts of Appeals regarding the application of the *American Pipe* tolling rule to a successor class action.

The federal Courts of Appeals for the First, Second, Fifth, Sixth, and Eleventh Circuits, have held that *American Pipe* tolling is not available for putative class members seeking to bring a successor class action following the denial of class certification (or upon the certification of a narrow class, followed by the filing of a successor class action on behalf of a broader class that was denied certification in the initial action). *See Basch v. The Ground Round, Inc.*, 139 F.3d 6, 15 (1st Cir. 1998) ("Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely); *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) (narrow class certified) (holding that *American Pipe* tolling doctrine "does not apply to permit a plaintiff to file a

subsequent class action following a definitive determination of the inappropriateness of class certification"); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334-1352 (5th Cir. 1985) ("Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely[.]"); *Andrews v. Orr*, 851 F.2d 146, 150 (6th Cir. 1988) (pendency of previously filed class action tolled limitations for subsequent individual actions but not subsequent class action); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) (pendency of class action did not toll limitations period for subsequent class actions by members of original asserted class).

Several district courts have also held that *American Pipe* tolling is not available for putative class members seeking to bring a successor class action after the denial of class certification.[5]

The underlying concern of the courts in each of these cases providing the *ratio decidendi* was that application of *American Pipe* tolling to successive attempts to certify a previously rejected class would

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[5] *See Kreek v. Wells Fargo & Company*, 652 F. Supp. 2d 1053, 1061 (N.D. Cal. 2009); *Sheppard v. Capital One Bank*, No. 06-7535, 2007 U.S. Dist. LEXIS 70061, at *10 (C.D. Cal. July 12, 2007); *Hunter v. Am. Gen. Life & Accident Ins. Co.*, 384 F. Supp. 2d 888, 893 (D.S.C. 2005); *Vinson v. Seven Seventeen HB Phil. Corp.*, No. 00-6334, 2001 U.S. Dist. LEXIS 25295, at *26 (E.D. Pa. Oct. 31, 2001); *In re Westinghouse Secs. Litig.*, 982 F. Supp. 1031, 1033-35 (W.D. Pa. 1997); *Phillips v. Kidder, Peabody & Co.*, 933 F. Supp. 303, 311-12 (S.D.N.Y. 1996); *In re Cypress Semiconductor Secs. Litig.*, 864 F. Supp. 957, 959 (N.D. Cal. 1994); *Smith v. Flagship Int'l*, 609 F. Supp. 58, 63-64 (N.D. Tex. 1985); *Burns v. Ersek*, 591 F. Supp. 837, 840-41 (D. Minn. 1984).

sanction an endless succession of class actions seeking to relitigate the class certification issue. Each case thus addressed the application of *American Pipe* tolling following a district court's denial of class certification. Moreover, most of these cases involved more than two successive class actions brought on behalf of the same group of plaintiffs. In *Basch*, 139 F.3d at 7, *Salazar-Calderon*, 765 F.2d at 1349, and *Griffin*, 17 F.3d at 358-59, the Courts of Appeals for the First, Fifth, and Eleventh Circuits respectively held that tolling was unavailable for the fourth class action filed on behalf of the same class members. In *Andrews*, 851 F.2d at 148, the Sixth Circuit held that tolling was unavailable in the third class action filed.

In contrast, the Courts of Appeal for the Third and Ninth Circuits have applied *American Pipe* tolling for the benefit of a putative class member seeking to bring a successor class action upon the denial of class certification in a prior action. *See Yang v. Odom*, 392 F.3d 97 (3rd Cir. 2004), *cert. denied*, 125 S.Ct. 2294 (2005); *Catholic Social Services, Inc. v. Immigration Naturalization Service*, 232 F.3d 1139 (9th Cir. 2000) (en banc); but *see Robbin v. Flour Corp.*, 835 F. 3d 213, 215 (9th Cir. 1987)(holding that commencement of class action did not toll statute of limitations for successor class action). In *Yang v. Odom*, the Third Circuit framed the issue as "the extent to which the suits contemplated in *Crown, Cork & Seal* – i. e., those brought by individuals following a denial of class certification – can be aggregated in a subsequent substantively identical class action." 392 F.3d at 103. The Court held that *American Pipe* tolling applied for the benefit of the subsequent class action:

> Given that *American Pipe* tolling would unquestionably apply were the plaintiffs here bringing individual actions, it would be at odds with the policy undergirding the class action device, as stated by the Supreme Court, to deny plaintiffs the benefit of tolling, thus the class action mechanism, when no defect in the class itself has been shown.

Id. at 106. In *Catholic Social Services v. Immigration Naturalization Service*, the Ninth Circuit, sitting en banc, concluded that the statute of limitations for claims in a successor class action was tolled during the pendency of the first class action in which class certification was denied:

> We hold that under the doctrine of *American Pipe* and *Crown, Cork & Seal* the statute of limitations was tolled during the pendency of the first class action for the class members and would-be class members in the action now before us, and that plaintiffs in this case may aggregate their individual actions into a class action.

232 F.3d at 1149. Also, the Second Circuit Court of Appeals applied *American Pipe* tolling to putative class members pursuing a successor class action, but the issue was never specifically decided by the Court and therefore it was assumed *sub silentio* that *American Pipe* tolling applied to the claims asserted in a successor class action. *See Cullen v. Margiotta*, 811 F.2d 698, 721 (2d Cir. 1987).

Moreover, the Courts of Appeal for the Second and Eighth Circuits have noted, in dictum, the possibility that they might apply *American Pipe* tolling for the benefit of a putative class member seeking to bring a successor class action upon the denial of certification in a prior action. *See Great Plains Trust Co. v. Union Pacific Railroad Co.*, 492 F.3d 986, 997 (8th Cir. 2007) ("Whether the American Pipe rule applies to subsequent class actions, however, depends on the reasons for the denial of certification of the predecessor action) (citing *Yang*, 392 F.3d at 111; *Catholic Social Services*, 232 F.3d at 1149); *Korwek*, 827 F.2d at 879 ("This Court notes that it leaves for another day the question of whether the filing of a potentially proper subclass would be entitled to tolling under *American Pipe*).

Several district courts have also held that *American Pipe* tolling is available for putative class members who seek to bring a successor class action upon the denial of class certification.[6]

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[6] *See Gomez v. Wagner-Barnett*, 622 F. Supp. 2d 710, 717 (S.D. Ind. 2008) ("Nothing in the Supreme Court's reasoning [in *American Pipe* and *Crown, Cork*] is limited to individual suits as distinct from fresh attempts to certify a class. The Court's broad language seems to encourage tolling regardless of differences in procedures . . ."); *In re National Australia Bank Sec. Litig.*, No. 03-6537, 2006 U.S. Dist. LEXIS 94163, at *15 (S.D.N.Y. Nov. 8, 2006) ("The Supreme Court's *American Pipe* tolling rule is designed to protect the interests of class members who are not only entitled, but encouraged, to rely on the class representative's claim up until and through class certification."); *In re Crazy Eddie Sec. Litig.*, 802 F. Supp. 804, 813 (E.D.N.Y. 1992) ("[A] second class action would not be an attempt to relitigate the question of class certification by filing repetitive claims").

No Circuit Court of Appeals has addressed the application of *American Pipe* tolling where, as here, there was *no* determination on class certification. But a handful of federal district courts have applied *American Pipe* tolling for the benefit of putative class members bringing a successor class action where there was "no definitive denial" of class certification in a prior class action.[7]

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[7] *See In re Vertrue Marketing and Sales Practices Litig.*, No. 09-75000, 2010 U.S. Dist. LEXIS, *30 (N.D. Ohio Feb. 25, 2010) ("This Court concludes that, where there has been no determination at all regarding the appropriateness of class certification, and a court of appeals has 'reinstated' the class allegations, subsequent class treatment is not precluded.") The district court in *In re Vertrue Marketing* found that its holding "appropriately balance[ed] the competing interests faced in *American Pipe*," since, "where no prior ruling exists (definitive or otherwise), indefinite stacking is highly unlikely to arise." *Id.* at *31-32; *see also Kandel v. Brother Int'l Corp.*, No. 08-1040, 2009 U.S. Dist. LEXIS 105242, at *10 (C.D. Cal. May 12, 2009) (applying *American Pipe* tolling to successive class action where no certification decision was made in the first class action and noting that "[s]equential class actions covering substantially the same subject matter can be problematic, but they do not raise statute of limitations related concerns."); *In re Issuer Plaintiff Initial Public Offering Antitrust Litig.*, No. 00-7804, 2002 U.S. Dist. LEXIS, at *12 (S.D.N.Y. Sept. 25, 2002) ("Since there was not a 'definitive' determination of class certification in the First Action, the tolling doctrine of *American Pipe* does indeed apply and plaintiffs may proceed with this action."); *Schur v. Friedman & Shaftan, P.C.*, 123 F.R.D. 611, 613 (N.D. Cal. 1988) (finding class members entitled to *American Pipe* tolling where no determination on class certification in the first action and therefore that plaintiff was "not attempting to relitigate an unsuccessful class certification motion[.]"; *but see In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F. Supp. 2d 1072, 1103 (N.D. Cal. 2007) (Holding that even when class certification issue was never reached in first action, "[w]hile the issue is far from clear cut, the court is nonetheless persuaded that class tolling should not be applied to plaintiffs' state law

There is accordingly widespread confusion and conflict among the lower courts over the application of the *American Pipe* tolling rule to a successor class action that should be resolved by this Court.

II. THE QUESTION PRESENTED IS IMPORTANT

Whether and under what circumstances the *American Pipe* tolling rule applies to putative class members seeking to assert a successor class action is an important and recurring issue. The widespread conflict and recurring confusion among the lower courts over the application of the *American Pipe* tolling rule has and will promote inconsistency and unfairness, which is particularly troubling when its application affects, as it does here, the interests of thousands of putative class members. Moreover, the policies underlying the *American Pipe* tolling rule – the benefits of Rule 23 and statutes of limitation – are critical aspects of federal civil litigation. The class action device promotes judicial efficiency and economy by permitting the consolidation of multiple claims in a single proceeding and provides a vehicle for the prosecution of claims too small in value to be brought individually. Statutes of limitation allow defendants to obtain repose and avoid surprise from stale claims. It is important therefore, for the Court to strike the proper balance between these policies in the application of the *American Pipe* tolling rule.

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claims here."); *In re Westinghouse Sec. Litig.*, 982 F. Supp. 1031, 1035 (W.D. Pa. 1997) (refusing to apply *American Pipe* tolling to subsequent class and noting that "it is beyond cavil that the dismissal of an entire action is about as 'definitive' a disposition of a motion for class certification as one is likely to find.")

This case provides the Court with the opportunity to do that.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE PLAIN LANGUAGE OF *AMERICAN PIPE* AND *CROWN, CORK* AND THE PRINCIPLES UNDERGIRDING THOSE DECISIONS

In dismissing petitioners' claims, the district court held that the *American Pipe* tolling rule does not apply to successor class actions. It further held that even if it did, tolling ceased for petitioners' claims when petitioners' counsel told the district court in *Dagher* that they would not be pursuing a rule of reason claim. Finally, the district court held that even if the *American Pipe* tolling rule applied and tolled the statute of limitations on petitioners' claims until November 15, 2006, when the district court received the mandate from the Ninth Circuit following this Court's decision in *Dagher*, that petitioners' Sherman Act Section 1 rule of reason claim and Clayton Act Section 7 claim do not "concern the same evidence, memories and witnesses" as the *per se* claim raised in *Dagher*. App. 9a (citing *American Pipe*, 424 U.S. at 562 (Blackmun J., concurring).

The Ninth Circuit's affirmance of the district court's decision conflicts with the plain language of *Crown, Cork*, in which this Court specified that "once the statute of limitations is tolled, it remains tolled for all members of the putative class *until class certification is denied.*" 414 U.S. at 354 (emphasis added). Here, by reason of the allegations in the complaint in *Dagher*, and the district court's never

entertaining or ruling on a motion for class certification in that case, the statute of limitations for the claims asserted in this case was tolled from the filing of the *Dagher* action on June 15, 1999, until the entry of final judgment by the District Court on November 15, 2006, in response to the issuance of the mandate of the United States Court of Appeals for the Ninth Circuit, following the decision of this Court in *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006).

The Ninth Circuit's affirmance of the district court's decision also conflicts with the principles undergirding *American Pipe* and *Crown, Cork*. Denying the application of *American Pipe* tolling to a successor class action undermines the efficiency and economy of litigation promoted by Rule 23. The *American Pipe* tolling rule is designed to protect the interests of absent class members who are not only entitled, but encouraged, to rely on the class representative's claim up to, until, and through class certification so that courts are not inundated with a flurry of lawsuits filed to protect claims. In addition, putative class members who wait until resolution of the certification issue in an original class action before pursuing other litigation can hardly be accused of sleeping on their rights. Therefore, applying *American Pipe* tolling to a successor class action in no way undermines applicable statutes of limitation.

Here, the class allegations in the *Dagher* action notified respondents that petitioners were challenging, under federal antitrust laws, the pricing practices of Equilon and Motiva – the same practices challenged in this case. Contrary to the holding in the district court and affirmed by the Ninth Circuit, there is little difference between a Sherman Act

Section 1 claim pursued under the *per se* rule or quick look rule of reason on the one hand, and a Sherman Action Section 1 claim pursued under the full rule of reason and a Clayton Act Section 7 claim on the other hand. As this Court has stated, "[t]he truth is that our categories of analysis of anticompetitive effect are less fixed than terms like *"per se"*, "quick look," and "rule of reason" tend to make them appear. We have recognized for example, that 'there is often no bright line separating a *per se* from Rule of Reason analysis . . .'" *California Dental Assoc. v. Federal Trade Commission*, 525 U.S. 756, 779-80 (1999) (citing *Nat'l Collegiate Athletic Ass'n. v Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984)). Further, *Crown, Cork* does not require that the claims be identical. See *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1489 (9th Cir. 1985) ("we find no pervasive authority for a rule that would require that the individual suit must be identical in every respect to the class suit for the statute to be tolled.")

The class allegations in the *Dagher* action also notified respondents of the number and type of potential plaintiffs – 23,000 Shell and Texaco retail gas station owners – the same class of plaintiffs here. The purpose of the underlying statute of limitation would therefore be no more frustrated here, in a later class action, than if petitioners had filed individual actions, which this Court has expressly permitted.

There is no reason the rationales for applying *American Pipe* tolling should be limited to intervenors and individual claims, and the Ninth Circuit's decision refusing to apply *American Pipe* tolling to this successor class action conflicts with the

plain language of *American Pipe* and *Crown, Cork* and the principles undergirding those decisions.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOUAD N. DAGHER; et al.,
Plaintiffs - Appellants,

No. 02-56509
D.C. No. CV-99-06114-GHK

v.

JUDGMENT

SAUDI REFINING INC., (SRI); et al.,
Defendants - Appellees,

and

MOTIVA ENTERPRISES LLC; et al.,
Defendants.

Appeal from the United States District Court for the Central District of California, Los Angeles.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered Tuesday, October 24, 2006

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 08-1283-GHK (JWJx)

Date July 11, 2008

Title *Mike M Madani, et al. v. Shell Oil Company, et al.*

Presiding: The Honorable GEORGE H. KING, U. S. DISTRICT JUDGE

Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiff: None

Attorneys Present for Defendants: None

Proceedings: (In Chambers) Order Re: Defendants' Motions to Dismiss

This matter is before the Court on Defendants' Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) (the "Motion"). We have considered the papers filed in support of and in opposition to the Motion, and deem this matter appropriate for resolution without oral argument.[1] L.R. 7-15.

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[1] Plaintiffs' Request for Oral Argument, filed July 1, 2008, is **DENIED.** We find counsel's briefing sufficient to advise us of the controlling issues. Our decision would not be further assisted by oral argument.

I. Introduction and Procedural Background

Defendants Shell Oil Company ("Shell"), Chevron Corporation[2] and Saudi Refining, Inc. ("Saudi Refining," and, collectively, "Defendants"), were partners in two joint ventures, Motiva Enterprises LLC ("Motiva") and Equilon Enterprises LLC ("Equilon"), created to refine and distribute petroleum products in the eastern and western United States, respectively.[3] These joint ventures sold their products to Shell- and Texaco-branded gas stations, and set a uniform price for such products. Defendants formed Equilon on January 1, 1998, and Motiva on July 1, 1998. Both joint ventures allegedly operated until October 9, 2001. Plaintiffs, gasoline retailers who purchased from the joint ventures, seek to represent a putative class of roughly 25,000 retailers who operated Shell- and Texaco-branded gas stations throughout the United States.

In 1999, another group of Shell and Texaco retailers brought a claim (the *"Dagher"* suit) alleging that the formation and conduct of the Equilon and Motiva joint ventures constituted a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, under the *per se* rule.[4] We granted summary judgment for defendants and dismissed that claim in 2002. *See Dagher v. Saudi Refining, Inc.*, No. CV 99-6114 GHK, 2002 WL 34099815 (C.D. Cal. Aug. 13, 2002). After reversal in the Ninth Circuit, the Supreme Court

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[2] Through its purchase of Texaco, Inc. ("Texaco").

[3] Saudi Refining did not participate in Equilon.

[4] Plaintiff Mike M. Madani, the lead Plaintiff here, was also a named plaintiff in *Dagher*.

ultimately upheld our ruling, agreeing that defendants were not in *per se* violation of the Sherman Act. *See Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

Plaintiffs filed this lawsuit in the Northern District of California on August 21, 2007, and it was later transferred here. Plaintiffs' Complaint alleges that Defendants' actions in forming and operating the joint ventures were in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 7 of the Clayton Act, 15 U.S.C. § 18. However, because the per se claim is precluded by the Supreme Court's decision in *Dagher*, Plaintiffs here allege that Defendants' conduct violated 15 U.S.C. § 1 under the rule of reason. Yet in the *Dagher* suit, plaintiffs specifically waived any rule of reason claim, even when given an explicit opportunity on the record to amend the pleadings in order to include such a claim. (Mot. Ex. I, Tr. of Dec. 6, 1999 Hr'g at 14:22-16:8.) Nonetheless, Plaintiffs now seek the proverbial second bite at the apple.

II. Statute of Limitations

The Complaint does not allege that the purported anti-competitive behavior continued past the time when the joint ventures ended. As such, Plaintiffs' claims cannot have arisen later than October 2001. As this Complaint was filed on August 21, 2007, it would ordinarily be time-barred on its face. Plaintiffs do not dispute that the four-year statute of limitations in Section 4B of the Clayton Act, 15 U.S.C. § 15b, governs both the Sherman and Clayton Act claims here. However, Plaintiffs argue that the limitations period was tolled while the *Dagher* suit was pending. Plaintiffs argue that the

tolling period extends from June 15, 1999, when the *Dagher* action was filed, to November 15, 2006, when this Court received the mandate from the Ninth Circuit affirming our grant of summary judgment pursuant to the Supreme Court's decision. If we accept this argument, then the Complaint is timely. If we reject it, the Complaint is time barred. Plaintiffs' theory rests on the "class action tolling" doctrine developed by *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), and its progeny. We conclude that class action tolling is unavailable here, and accordingly GRANT Defendants' Motion.

III. Class Action Tolling

The tolling doctrine expressed in *American Pipe*, and developed subsequently, is limited in scope. In *American Pipe*, the Supreme Court held that tolling applied to intervening plaintiffs while a certification decision was still pending in the original action. The Court held that, "at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *American Pipe*, 414 U.S. at 552-53. Later, in *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), the Court held that tolling is also available for a subsequent individual action brought by a putative class member after certification is denied in the original action. *Crown*, 462 U.S. at 354. Despite these narrow origins, Plaintiffs now seek a considerable expansion of the class action tolling

doctrine.

A. Class Action Tolling for Subsequent Class Actions

In *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), the Ninth Circuit held that class action tolling is unavailable for subsequent class actions, declining to extend the holding in *Crown* that tolling was available for both intervention and subsequent individual actions. *Robbin,* 835 F.2d at 214. *Robbin* concerned a class action suit for securities fraud, initially filed in New York, in which class certification was denied (after a prior dismissal, appeal, and remand), leading to voluntary dismissal. *Id.* Later, a new class action was filed in California alleging the same violations as the prior New York action. *Id.* The Ninth Circuit, siding with numerous other courts that had considered the same question, held that "to extend tolling to class actions 'tests the outer limits of the *American Pipe* doctrine and ... falls beyond its carefully crafted parameters into the range of abusive options.'" *Robbin,* 835 F.2d at 214 (quoting *Korwek v. Hunt,* 827 F.2d 874, 879 (2d Cir. 1987)).

The Ninth Circuit, sitting en banc, later found an exception in *Catholic Social Services, Inc. v. I.N.S.,* 232 F.3d 1139 (9th Cir. 2000) ("CSS"). But Plaintiffs' argument has the effect of allowing this exception, granted on unique facts not present here, to swallow the rule clearly expressed in *Robbin.* The court in *CSS* merely extended tolling to a subsequent class action filed to cure a deficiency created when Congress enacted a new statute while an appeal was pending. CSS, 232 F.3d at 1146-47. The new statute had eliminated the claims of the named plaintiffs in the previously certified class. *Id.* As the Ninth Circuit

specifically stated in allowing tolling, "[t]he substantive claims asserted in this action are thus within the scope of those asserted in the earlier action, and the dismissal of that [earlier] action did not result from an adverse decision on the merits of any of those claims." *Id. at* 1149. Here, by contrast, dismissal of the *Dagher* action resulted precisely from an adverse decision on the merits of the claim there. Plaintiffs were not forced by Congressional intervention to change their claims. Rather, they have simply decided to pursue a theory that was abandoned in prior litigation. As such, we conclude that CSS is inapplicable here and that tolling does not apply to Plaintiffs' action under the broad rule announced in *Robbin.*

B. Class Action Tolling for New Claims

Even were we to conclude that *CSS* broadly abrogated the holding in *Robbin,* this action would still not be amenable to tolling because of the differences between the rule of reason and Clayton Act claims alleged in this action and the per se theory pursued in *Dagher.* Plaintiffs argue that class action tolling continues until a ruling on certification. However, such a rule would be senseless here. As there was no ruling on certification in *Dagher,* such a rule would entail that tolling still has not ended.

We conclude that any tolling available to Plaintiffs ended when counsel in *Dagher* waived, on the record, any reliance on a rule of reason theory. At that point, it became clear that the class in *Dagher* could not and would not adjudicate a rule of reason claim. Absent class members were therefore obligated to assert any rule of reason claim at that time.

As the Court noted in *American Pipe*, "statutory limitation periods are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *American Pipe*, 414 U.S. at 554 (internal citations and quotation omitted). Tolling is permissible when commencement of the class suit "notifies the defendants not only of the substantive claims being brought against them [and] of the number and generic identities of the potential plaintiffs who may participate in the judgment." *Id.* at 555.

Defendants did not merely lack notice of the claims at issue here. Once counsel in *Dagher* disclaimed any reliance on rule of reason analysis, Defendants had affirmative notice that such claims were not at issue. Despite Plaintiffs' arguments to the contrary, there are substantial differences between rule of reason and per se claims.[5] The rule of reason

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[5] The differences between claims under Section 1 of the Sherman Act and Section 7 of the Clayton Act are also substantial. A Section 7 Clayton Act claim relates to anti-competitive behavior in the context of mergers and acquisitions, and so would purportedly address the formation of the joint ventures. Section 1 Sherman Act claims address anti-competitive behavior more generally. *Dagher* did not involve a claim under Section 7 of the Clayton Act.

claim here does not "concern the same evidence, memories, and witnesses" as the per se claim raised in *Dagher*. *See id.* at 562 (Blackmun, J., concurring). Rather, adjudicating the rule of reason claim would require analysis of market conditions, possible pro- and anti-competitive effects of the Equilon and Motiva joint ventures, and other factors that were not at issue in *Dagher*.

As the Court also reasoned in both *American Pipe* and *Crown*, allowing tolling while a class action is pending also promotes "the efficiency and economy of litigation" behind the class action procedure allowed by Fed. R. Civ. P. 23. *See American Pipe*, 414 U.S. at 553-54; *see also Crown*, 462 U.S. at 349-50 (discussing the holding in *American Pipe*, and the purpose of promoting the efficiency of the class action by allowing tolling). As stated in *Crown*, "unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights." *Crown*, 462 U.S. at 350. To disallow tolling would prompt unnamed members of the purported class to intervene, or to file defensive individual actions while decision on the class claim was still pending. *Id.* Prompting such a flurry of individual suits or motions to intervene would defeat the purposes behind Rule 23.

The same concerns are not present here, however. To the contrary, while purported members of the instant class may have relied on the *Dagher* case before it was clear that the rule of reason would not be asserted (and hence tolling would prevent interference with the potential class), once the rule of reason claim was specifically excluded from *Dagher*,

potential class members interested in asserting a claim based on that theory could not reasonably rely on the *Dagher* class to protect their rights. Neither the rule of reason nor the Clayton Act were subject to adjudication in *Dagher*. No class member can expect a class to protect rights that are not asserted. That is particularly clear where, as here, class counsel had disclaimed any intention of asserting such rights. Post-waiver, any subsequent intervention, individual suit, or class action based on the rule of reason or the Clayton Act would not have interfered with the purpose of the purported class under the per se theory in *Dagher*. This is because the potential class in *Dagher* would address solely a different theory of relief.

We would frustrate the purposes behind the limitations period were we to allow tolling here.[6] Moreover, we would do nothing to promote the efficiency and judicial economy that Rule 23 is designed to protect.[7] The explicit waiver in *Dagher* gave sufficient notice to absent class members that only a per se claim would be adjudicated in that

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[6] We do not hold that counsel's disavowal of a rule of reason claim in *Dagher* has any res judicata or estoppel effects on Plaintiffs here. We intimate no opinion on such issues.

[7] Contrary to Plaintiffs' arguments, our holding would not have required "a needless multiplicity of actions." (See Opp'n at 18:10-16.) Our holding requires nothing more of prospective plaintiffs than that they raise claims—whether by intervention, individual action, or a separate class action—once it becomes clear that such claims cannot be adjudicated by an existing class.

action, and hence of the need to assert a rule of reason claim at that time. As such, we decline to extend tolling past the point at which counsel in *Dagher* waived, on the record, the rule of reason claim now asserted in this action.

C. Class Action Tolling Pending Appeal

Even were we to construe the waiver in *Dagher* as insufficient notice, any prospective litigants wishing to assert rule of reason and Clayton Act claims were, at the latest, put on notice by our judgment in the *Dagher* action. Such judgment was entered August 13, 2002, more than four years before Plaintiffs' Complaint was filed in this action. Nothing precluded Plaintiffs from bringing suit at that time, as the claims in the current action could not have been adjudicated by the appeal in the *Dagher* action. As such, even were we to apply tolling after the explicit waiver in *Dagher*, this claim would still be time-barred.

IV. Conclusion

Class action tolling is precluded by the broad holding of the Ninth Circuit in *Robbin*, as the facts here do not fit the narrow exception permitting tolling for a subsequent class action recognized in *CSS*. Moreover, even had this case been brought as an individual action, tolling would still be unavailable due to the change in claims and the long duration between the entry of judgment in *Dagher* and the filing of this action. As such, the Motion is **GRANTED.**[8] Because Plaintiffs' claims are barred by

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[8] In light of our holding that class action tolling does not apply here, we need not address Defendants'

the statute of limitations, the Complaint is **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

_____ : _____

Initials of Preparer ___Bea_____

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alternative argument that the Complaint fails to state a claim because it does not adequately allege a relevant geographical market for the purported anti-competitive activity.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MIKE M. MADANI, et al.

Plaintiffs,

CASE NO. CV 08-1283-GHK (JWJx)

JUDGMENT

v.

SHELL OIL COMPANY, et al.,

Defendants.

Based on our July 11, 2008 Order granting Defendants' Motion to Dismiss, **IT IS HEREBY ADJUDGED** that Plaintiffs' claims are **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

DATED: July 11, 2008

s/
GEORGE H. KING
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKE M. MADANI; et al.,
Plaintiffs - Appellants,
v.
SHELL OIL COMPANY; et al.,
Defendants - Appellees.

No. 08-56332
D.C. No. 2:08-cv-01283-JWJ

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Submitted December 9, 2009**
Pasadena, California

Before: THOMPSON and SILVERMAN, Circuit Judges, and BOLTON***, District Judge.

Plaintiffs appeal the district court's dismissal of their antitrust action as barred by the statute of limitations. We have jurisdiction pursuant to 28

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

U.S.C. § 1291, review de novo, *Williams v. Boeing Co.*, 517 F.3d 1120, 1135 (9th Cir. 2008), and affirm.

The district court correctly ruled that the limitations period for this class action was not tolled by a prior class action. *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987). Nor does *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2002) (en banc), compel a different result. None of the peculiar reasons justifying tolling in that case is present in this case. *Id. at* 1147-49.

AFFIRMED.

FILED JAN 25 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKE M. MADANI; et al.,
Plaintiffs - Appellants,

No. 08-56332
D.C. No. 2:08-cv-01283-GHK-JWJ

v.

Central District of California, Los Angeles

SHELL OIL COMPANY; et al.,
Defendants - Appellees.

ORDER

Before: THOMPSON and SILVERMAN, Circuit Judges, and BOLTON,* District Judge.

The panel has voted to deny appellants' petition for rehearing. Judge Silverman has voted to reject the petition for rehearing en banc and Judges Thompson and Bolton so recommend.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

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* The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.